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January 25, 2008

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 JAN 25 PM 1:39
CHIEF CLERKS OFFICE

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
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Via facsimile and U.S. Mail

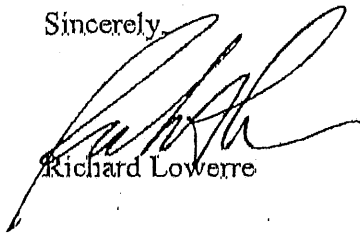
Re: **In the matter of the application of ASARCO, Inc., for renewal of Air Quality
Permit No. 20345, El Paso, El Paso County.**

Dear Ms. Castañuela:

Enclosed please find the original and eleven copies of **Brief of Sierra Club and
Parties Aligned with Sierra Club** in the above-referenced matter.

If you have any questions please call.

Sincerely,


Richard Lowerre

Enclosures

SOAH DOCKET NO. 582-05-0593
TCEQ DOCKET NO. 2004-0049-AIR

IN THE MATTER OF THE
APPLICATION OF ASARCO, INC.
FOR RENEWAL OF
AIR QUALITY PERMIT NO. 20345
EL PASO, EL PASO COUNTY

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 JAN 25 PM 1:39
CHIEF CLERK'S OFFICE

**BRIEF OF THE SIERRA CLUB AND ALIGNED PARTIES IN
OPPOSITION TO THE RENEWAL OF ASARCO'S AIR QUALITY PERMIT NO. 20345
TO THE COMMISSIONERS OF TCEQ:**

Comes now, Protestants Sierra Club, the Honorable Eliot Shapleigh, Get the Lead Out Coalition, Students Against ASARCO, Quality of Life El Paso, and Debra Kelly, and hereby submit this, their brief opposing the recommendation of the Executive Director on issuance of the renewal of Air Quality Permit No. 20345 to ASARCO, Inc.

I. Summary: The Commission should follow the recommendation of SOAH and deny the renewal based on ASARCO's compliance history, because:

- a. As the Proposal for Decision and the 36 proposed findings of fact make clear, the evidence in the record shows a callous disregard by ASARCO of Texas law, TCEQ rules and its permit. Some violations, such as those dealing with hazardous waste, suggest a knowing decision by ASARCO to violate the law.
- b. There is nothing in the evidence or in the Executive Director's Report to address the vast majority of the violations found by SOAH. There is not even a basis for remand to SOAH for new evidence.
- c. ASARCO failed to address the compliance history issue in the remand process.
- d. As the proposed conclusion of law states,

ASARCO failed to prove its compliance history for the last five years of operation ...warrants renewal of Permit NO 20345. See ALJs' Proposed Order, page, 61, COL No. 67.

Denial is appropriate because it also would simply allow TCEQ to evaluate ASARCO under a new permit application to which the current standards and rules would apply. Given

ASARCO's compliance history, the fact that the plant has been shut down for a decade, and the potential risk to the public, on both sides of the border, ASARCO should not be allowed to continue to be grandfathered.

II. Introduction: Whether Texas law required a remand of the ASARCO application to the ED is now not the issue.¹ Even with this new opportunity to remedy the inadequacies, ASARCO has not provided any basis to reverse the recommendation of SOAH that the renewal be denied due to ASARCO's compliance history.

In the limited time that ASARCO operated under its air permit, ASARCO repeatedly acted in direct violation of state and federal law. ASARCO was subject to several enforcement actions at the state and federal level. As the evidence from the hearing below shows, those enforcement actions did not deal with the extent of the violations.

The twenty page discussion in the PFD and the 36 proposed findings of fact show that, ASARCO operated its plant in clear violation of State law and the permit during virtually the entirety of its six years of operation in the 1990s. ASARCO apparently did so knowingly for the majority of the time.

ASARCO has never shown it could or will comply with the 1992 permit terms or the current terms. And, now ASARCO's ability is even more in doubt with its in bankruptcy. It has even fewer financial resources to assure compliance, and it faces large financial claims against ASARCO, such as that of the International Boundary and Water Commission for \$27.5 million dollars in damages to IBWC's land and groundwater.²

ASARCO simply did not show during the hearing or during the ED second additional review process that ASARCO has the ability, financial or technically, the intent or even the desire to operate its facility in compliance with State law and its permit.

The proper solution is denial of the permit renewal. ASARCO may then apply for a new permit. Denial does not shut down the facility. Denial apparently will not even put anyone out

¹ Sierra Club and aligned parties do not think that the Legislature intended the interpretation urged by ASARCO when there is a contested case hearing, as it creates an impossible conflict with House Bill 801 and other requirements for public participation, especially where the issues involve compliance history.

² In re: ASARCO, LLC, et al, Case No. 05-21207, U.S. Bankruptcy Court, Southern District of Texas, Corpus Christi. See ASARCO's Prehearing Brief on the U.S. IBWC Site

of a job. Denial now simply requires ASARCO to apply for and meet the test of a new permit, under current laws and rules.

III. ASARCO's Compliance History: ASARCO violated its permit and both state and federal laws and rules. Those violations resulted in adverse affects, including emissions of air pollutants higher than health standards with cumulative and negative impacts on public health and property. There are numerous examples provided in the PFD and findings of fact, including:

A. ASARCO Burned Hazardous Waste Without Any State or Federal Authorization:

From 1993 through 1997, ASARCO processed hazardous waste, the Encycle "concentrate" in violation of the permit and state law and rules. The evidence at the hearing showed that ASARCO processed "copper-sulfide-bearing materials" from the Encycle facility in Corpus Christi. (Tr. 100) The evidence shows that EPA found that the plant had processed Encycle materials at its smelter, that the Encycle materials were a hazardous waste, and that the plant did not have the appropriate authorizations to process the hazardous waste. (Id. 101-02; City of El Paso Exh. 19) In effect, ASARCO took part in sham recycling activities, given that had been in control of both the generation at Encycle in Corpus Christi and the disposal at ASARCO in El Paso. (City of El Paso Exh. 7)

ASARCO has never provided any valid excuse for such violations, nor sought to provide any procedures in the permit or plant operations standards to assure that such violations will not occur again.

B. ASARCO Shut Down and Replaced its "ConTop" Reactors Without Notifying or Obtaining Required Authorization from TCEQ: When the ConTop reactors, the main facilities permitted pursuant to the 1992 air quality permit, failed to perform as ASARCO alleged they would, they were shutdown and replaced.³ ASARCO failed to notify the Commission or the

³ Sierra Club and others had originally opposed the 1992 permit, but had agreed to withdraw their opposition based on representations by ASARCO that the ConTop would perform as the Best Available Control Technology for the

public of that fact and then failed to obtain the required amendments or other authorizations to shut down and replace the two ConTop reactors. (Tr. 369-70) ASARCO replaced the reactors with ones ASARCO designed and constructed, but ASARCO did not seek TCEQ review, approval or permit amendment for such new reactors. (Tr. 206)

As the evidence in the record shows TCEQ's permit engineer, LeRoy "Skip" Clark, P.E. for ASARCO's 1992 permit application and all subsequent permit amendments through 2005, was not aware that the ConTop reactors had been replaced in 1993, only learning of the replacement at the July 2005 Hearing. (Tr. 1726) ASARCO had its opportunity to rebut the testimony of Mr. Clark at the contested case hearing, but did not. ASARCO's efforts to do so now, without reference to valid support in the evidence, must be rejected.

TCEQ rules require that a modification of an existing permitted facility be handled through an amendment or other type of revision to the permit. (30 TEX. ADMIN. CODE §§ 116.110 & 116.116) Mr. Clark admitted that rebuilding the reactors, without going through the notice and approval process, is something for which an NOV would be issued. (Tr. 1742) ASARCO operated the unauthorized reactors for almost 6 years, but never advised TCEQ.

TCEQ should take action to discourage such behavior. Penalties are one option, but, in the present case, the violations justify denial of the renewal. They justify requiring a new permit prior to any restart of ASARCO's facilities. ASARCO must not be allowed to get the benefit of its violations and then avoid the full review of its operations under current laws and standards.

C. ASARCO Emitted Sulfur Dioxide (SO₂) in Excess of the Permitted Emissions

Limitations. ASARCO began operation of the plant in March 1993. (Tr. 416) When it finally conducted the required stack testing in December 1993,⁴ it found that emissions of SO₂ were far

emission of air pollutants. Whether ASARCO knew at the time that they would not so perform or not, the basis for the 1992 permits was clearly invalid, and ASARCO learned that almost immediately after start up.

⁴ The permit required ASARCO to do stack testing within 60 days and not later than 180 days after startup of the facility. (Tr. 418; ASARCO Exh. 25, p. 8; ACOEN Exh. 2, p. 8) ASARCO did not comply with that provision, failing to do stack testing until December 1993—nine months, or approximately 270 days after startup. (Tr. 416)

in excess of permitted limits. (Tr. 413) For example, emissions from the copper stack annulus, the source of approximately 60% of SO₂ emissions from the plant, were found to be five times higher than permitted levels. (Tr. 73-76)

TCEQ issued its Notice of Violation (NOV) on April 14, 1994, and included nine different violations involving seven pollutants, including SO₂. (Sierra Club Exh. 3, pp. 10-11) According to the NOV, ASARCO was emitting SO₂ at a level 9.5 times higher than the permitted rate. (Id.) Yet, there is no evidence that ASARCO cut back on production or took other significant steps to comply with the 1992 permit at that time or before 1995, when ASARCO obtained an amendment to its permit to increase emissions. (The SO₂ limits were doubled in the 1995 amended permit, and those changes were made without the public notice and opportunity for a hearing that were provided for the 1992 permit, despite being major increases in admissions.) (ASARCO Exh. 27) Again, all the evidence indicates that ASARCO knew it was violating its permit for two years.

D. ASARCO emitted carbon monoxide (CO), nitrogen oxides (NO_x), and volatile organic compounds (VOCs) in exceedance of its permitted emissions limitations. In 1998, using the Texas audit privilege law to shield it from penalties, ASARCO conducted an audit that included sampling of CO, NO_x, and VOCs. (Tr. 414-15) As with the stack testing and SO₂ emissions five years earlier, the sampling revealed that emissions of all three contaminants were far in excess of permitted levels. Instead of reducing production or otherwise cutting emissions back to authorized levels, ASARCO again simply requested a permit amendment and continued on in violation. That permit was issued in 1999. (City of El Paso Exh. 6, p. 2)⁵ It appears clear

⁵ The 1999 amendment increased CO levels by 11 times the 1993 permit for CO, 2.5 times for NO_x and 2 times for VOCs. (ASARCO Exh. 27) Even though emissions levels of these three pollutants were allowed to rise dramatically, ASARCO never remodeled the new emissions levels it proposed for the 1999 permit amendment to determine whether these increased emissions would cause or contribute to a condition of air pollution in the El Paso region. (Tr. 634-5)

from the evidence, that in the case of CO, NO_x and VOCs, ASARCO was in violation of the permit limitations from 1993 until 1999. In fact, at the hearing on the merits in July 2005, ASARCO admitted that it had operated the plant in violation of the NO_x emissions limitations from 1993 through 1999.

The immunity from penalties that ASARCO got under the audit law does not relieve ASARCO of its responsibility to show that such violations will not occur again. As the PFD makes clear, ASARCO never did so in the evidentiary record. (Tr. 80) It never, for example, proposed the type of independent testing and reporting to TCEQ that would provide timely notice of violations. ASARCO does not even propose to monitor all of the one hundred emissions points at the facility. It proposes three points. Thus, ASARCO has not even agreed to determine its total emissions.

E. ASARCO Has Released Levels of Lead and Arsenic Far in Excess of Permitted Limitations. When ASARCO conducted performance testing in 1993, it also discovered that its modeling had underestimated the emissions of a number of heavy metals, including arsenic and lead. Based on this discovery, ASARCO again sought and received an amendment of the permit that significantly increased permitted emissions of certain heavy metals from the water treatment plant spray dryer. The amendment increased emissions of arsenic from that point by 1545% and emissions of lead from that point by 3900%. (City of El Paso Exh. 10) While the permitted levels were increased dramatically, ASARCO did not even then conduct modeling to determine whether such increases in the emissions of lead and arsenic would cause or contribute to a condition of air pollution in the El Paso region. (Id.) Because emissions of arsenic, lead, and other metals were only measured once in the 1990s, there is no way of knowing how high the emissions rates for metals actually were during the six years of operation.

F. Conclusion: The Pattern is Clear. The Commission should, as the ALJ's did, assume that ASARCO will simply continue to violate the law and continue to operate to protect its

bottom line. It should assume that ASARCO will hide the information from TCEQ until ASARCO is ready to provide it to TCEQ. There is no evidence to the contrary. There are no proposals by ASARCO to counter the evidence in the record.

For example, instead of proposing to pay for the type of independent testing or other steps that would provide TCEQ and the public the information then need to if ASARCO complied with its permit, ASARCO continues to deny there were serious violations. To propose a real solution, ASARCO knows it would have to admit that there was a real problem. No permit should be issued until it does!

Thus, if the renewal is issued now, TCEQ will again be dependant upon ASARCO to determine whether it is in compliance and to report violations to TCEQ. Why should anyone assume that it will do it right this time.

Finally, the burden is not on the Executive Director to propose conditions in the permit to assure compliance when there is a history of non-compliance. As SOAH indicated, the burden is on ASARCO, just as the burden is on ASARCO to propose proper designs and operating conditions.⁶

This is especially true for a facility, such as ASARCO's, which is located in an urban setting, and exposes homes, schools, hospitals, churches, other facilities, and those outdoor play and work areas – on both sides of the border – to increased emissions. This is also especially true because ASARCO has already exposed the people in those buildings and outdoor areas to levels of pollutants much higher than authorized.

⁶ Likewise, ASARCO has never proposed testing of incoming materials, even though its plant processes copper concentrates from around the world. Many of the concentrates, including sulfur and lead, can have very different levels of contaminants. Yet, emission limitations are based on ASARCO's representations about the range of contaminant levels and the evidence in the record shows that the information provided by ASARCO did not represent the actual concentrates it accepted. (Tr. 1072-73; ASARCO Exh. 42; City of El Paso Exh. 17)

The reason that ASARCO has never proposed the extra steps justified by its past actions in the current setting appears clear. ASARCO has never, and probably cannot ever, operate this ancient smelter in compliance with the permit conditions and make the profit it seeks. It has never shown that it will cease violations or even minimize the violations when it "discovers" its violations.

The ALJs viewed the evidence of violations and made their recommendation to deny the renewal on several bases, including the issue of compliance. Nothing has changed to alter the facts in evidence or even justify a reopening of the hearing to consider new facts.

IV. TCEQ's Authority to Deny ASARCO's Renewal Application: Texas law and TCEQ's rules that apply to this renewal application provide ample authority for TCEQ to deny the application. See for example Section § 5.754, TEX. WATER CODE⁷ and ALJs' Proposed Order, page 61, COL No. 67.

Moreover, even if TCEQ were correct in relying upon §382.055(f), TEX HEALTH & SAFETY CODE to remand ASARCO's application to the Executive Director § 382.055(f), the decision here still has to be based on the evidence in the record. ASARCO did not meet its burden of proof in the hearing, and there is no new basis to reject the proposed findings of fact and conclusions of law or even remand this for more evidence.

The recommendations of denial based on compliance history can and should be adopted.

⁷ § 5.754 provides:

(e) The commission by rule **shall provide for the use of compliance history** classifications in commission decisions regarding: (1) the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit....

(i) ... Notwithstanding any provision of this code or the Health and Safety Code relating to the granting of permits or permit amendments by the commission, the commission, after an opportunity for a hearing, **shall deny** a regulated entity's application for a permit or permit amendment if the regulated entity's compliance history is unacceptable based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations.

V. Prayer: WHEREFORE, PREMISES CONSIDERED, Protestants respectfully urge this Commission to deny ASARCO's application for renewal of Air Quality Permit No. 20345.

Respectfully submitted,

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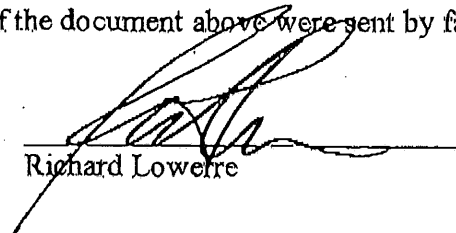
By:


Richard Lowerre, State Bar No. 12632900

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Certificate of Service

I hereby certify that on January 25, 2008, copies of the document above were sent by fax, and/or mail to the following as indicated below:


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DOCUMENTS	NUMBER OF PAGES (not including cover pg.)
Sierra Club and Aligned parties Brief	11

COMMENTS:

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